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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

TURNER BROADCASTING SYSTEM, INC., *ET AL.*,
Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION, *ET AL.*,
Appellees.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF UNITED STATES TELEPHONE ASSN., AMERITECH CORP., BELL ATLANTIC CORP., BELLSOUTH CORP., GTE SERVICE CORP., NYNEX CORP., PACIFIC TELESIS GROUP, ROCHESTER TELEPHONE CORP., AND SOUTHWESTERN BELL CORP., AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS

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QUESTIONS PRESENTED

Amici will address the following questions implicated by this Court's review of the constitutionality of the must-carry rules contained in 47 U.S.C. §§ 534 and 535:

1. Whether this Court should create an industry- or medium-specific First Amendment hierarchy, relegating video programming to a status of less than-full constitutional protection.

2. Whether, instead of relying on the identity of the medium used to transmit information, this Court should assess the constitutionality of a government restriction on expression on the basis of the nature of the restriction, recognizing the critical difference among direct bans on speech, speaker- or content-specific preferences, and nondiscriminatory access rules.

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BRIEF *AMICI CURIAE* OF UNITED STATES TELEPHONE ASSOCIATION, AMERITECH CORPORATION, BELL ATLANTIC CORPORATION, BELLSOUTH CORPORATION, GTE SERVICE CORPORATION, NYNEX CORPORATION, PACIFIC TELESIS GROUP, ROCHESTER TELEPHONE CORPORATION, AND SOUTHWESTERN BELL CORPORATION, IN SUPPORT OF APPELLANTS

INTEREST OF *AMICI CURIAE*[*]

Amici are communications companies in the business of providing telecommunications services and products to the general public, including local telephone service regulated as common carriage under state laws and the federal Communications Act of 1934.[1] *Amici* file this brief to support the appellants' position that the must-carry rules of 47 U.S.C. §§ 534 and 535 are unconstitutional, and also to urge this Court to adopt a framework of analysis of this case based on the nature of the governmental restrictions on speech rather than to relegate an entire category of expression — video programming — to less-protected status. *Amici's* interest in this case is twofold:

First, telephone companies are prohibited by federal statute from providing "video programming" directly to subscribers within their telephone service area. 47 U.S.C. § 533(b). "Video programming" is defined as "programming provided by, or generally considered comparable to programming provided by, a television broadcast station." *Id.* at § 522(16).

On August 24, 1993, the United States District Court for the Eastern District of Virginia held § 533(b) unconstitutional under the First Amendment, both on its face and as applied. *Chesapeake & Potomac Telephone Co. of Virginia v. United States*, No. 92-1751-A, Mem. Op. (E.D. Va. Aug. 24, 1993), *appeal pending*, Nos. 93-2340 (4th Cir.) (filed Oct. 15, 1993). Additional First Amendment challenges to § 533(b) are currently pending in other

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[*] Letters reflecting written consent of the parties to the submission of this brief have been filed with the Clerk of the Court.

[1] Also included as an *amicus* is the primary trade association of the local telephone industry, the United States Telephone Association.

federal district courts. *See Ameritech Corp. v. United States*, No. 93-642 (N.D. Ill.) (filed Nov. 1, 1993); *Ameritech Corp. v. United States*, No. 93-CV-74617-CT (E.D. Mich.) (filed Nov. 1, 1993); *U S WEST v. United States* (W.D. Wash.) (filed Nov. 3, 1993).

Amici believe that, in adjudicating the constitutionality of 47 U.S.C. §§ 534 and 535, this Court would be aided by a fuller picture of the relevant statutory framework — especially the immediately adjacent provision, 47 U.S.C. § 533(b), containing the ban on video programming by telephone companies. In particular, *amici* respectfully suggest that this Court should not issue a broad edict resolving the constitutionality of the must-carry access rules that would prejudge constitutional questions raised by § 533(b)'s direct ban on speech — questions that may well be before the Court within a year. *Amici* believe that they can be of assistance to the Court in identifying the features of the instant case that would permit an appropriately narrow resolution.

Second, and more generally, *amici* have an interest in this case because print, television, telephone, computer, and cable technologies are already converging in a single information services market. *Amici* have a strong interest in ensuring that no artificial legal distinctions are drawn among different media whose means of delivering information — however distinct they may have been in the past — are now merging.

Telephone companies are deploying fiber optic cable with the capacity for video as well as voice transmission. Newly developed signal compression technologies allow video programming to be transmitted over copper telephone wires as well. As a result, *amici* have become *communications* companies rather than simply *telephone* companies. In addition, telephone and cable companies have formed alliances to deliver telecommunications services more efficiently to American consumers.[2] *Amici* therefore have a direct

[2] On May 16, 1993, U S WEST announced that it had bought a 25 percent stake in Time Warner Entertainment, the nation's second-largest cable company, in a move to create interactive cable networks. On Oct. 12, 1993, BellSouth announced plans to acquire a 22.5 percent stake in Prime Management Co., which operates cable systems. On Oct. 4, 1993, NYNEX announced that it was investing $1.2 billion in Viacom, a cable company; NYNEX is also the largest cable provider in the United Kingdom. On Feb. 10, 1993, Southwestern Bell announced plans to buy two Washington, D.C. area cable systems from Hauser Communications. Pacific Telesis is awaiting federal approval to purchase 75 percent of Prime Cable of Chicago. And on October 13, 1993, Bell Atlantic announced a planned merger with Tele-Communications, Inc. (TCI) and Liberty Cable.

These transactions have not implicated the ban on video programming by telephone companies embodied in 47 U.S.C. § 533(b). Southwestern Bell's acquisition, for example, occurred outside its telephone service area and thus was not covered by the statute. Even Bell Atlantic, against whom enforcement of § 533(b) has been enjoined, has committed not to retain any cable systems owned by TCI or Liberty Cable in the Bell Atlantic telephone service area.

and legitimate interest in the regulatory regime governing the provision of video programming.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici believe that the must-carry rules contained in 47 U.S.C. §§ 534 and 535 violate the First Amendment, primarily for the reasons stated in Judge Williams' opinion below: they require cable operators to carry the speech of a special class of government-preferred speakers — local commercial and noncommercial television stations. *Amici* agree with Judge Williams that "Congress cannot advance specific content by requiring a competing class of First Amendment speakers to carry the favored speech." *Turner Broadcasting System, Inc. v. FCC*, 819 F. Supp. 32, 62 (D.D.C. 1993) (dissenting opinion). In addition, *amici* believe that the must-carry rules could not survive scrutiny under the test of *United States v. O'Brien*, 391 U.S. 367, 377 (1968), and *Ward v. Rock Against Racism, Inc.*, 491 U.S. 781, 798 (1989).

Amici submit, however, that even if this Court were to uphold the must-carry rules, it should decide this case in a way that does not prejudge the telephone companies' pending constitutional challenge to 47 U.S.C. § 533(b), which prohibits telephone companies from providing "video programming" directly to subscribers within their telephone service areas. A federal district court has invalidated § 533(b) under the First Amendment; the decision is on appeal to the Fourth Circuit and may well be before

this Court within a year. Additional challenges to § 533(b) are pending in other federal district courts.

I. The Court should not attempt to create a pigeonholed First Amendment hierarchy with different levels of constitutional protection for different technologies. The question before the Court is not whether cable television is more like newspapers or more like broadcasting. This Court has indicated that "[e]ach medium of expression . . . must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975). But that does not mean that this Court should constitutionalize a First Amendment pecking order in which certain members of the press receive preferential treatment and others are relegated to disfavored status depending solely upon how the products of their creativity and editorial judgment are delivered to the public.

Amici urge this Court to bear in mind several developments militating strongly against an industry-specific hierarchical approach:

A. The Nation and the world are in the midst of a telecommunications revolution, which would overwhelm any attempt to draw constitutional lines on the basis of changing technological characteristics. Even newspapers and magazines, the most traditional members of the press, are no longer simply print media. They are now available electronically to millions of computer users, who can read the publications in electronic form or print them out in the familiar paper format. The difference between print journalism and electronic forms of communication is now simply a matter of whether the printing occurs at a central plant or instead at each reader's home or office.

As the computer, telephone, and television combine with cable technology to usher in a new era of interactive, multimedia communications services, it is becoming impossible to define the traditional media in technological terms. The carriage capacities of the new broadband networks will be vast, and companies like *amici* will make them available to independent programmers of all affiliations and views. In the new information age, even the soapbox orator will have the power to be seen as well as heard.

B. In any event, this Court should not relegate video programming to the low end of a First Amendment hierarchy.

1. More people rely on video programming than on any other source of news and entertainment. Moreover, video programmers exercise the same kind of editorial discretion as do newspaper and magazine publishers. If anything, the Government's power to regulate entry into video programming should be subject to heightened, not reduced, First Amendment scrutiny.

2. The Government's narrow justification for the must-carry rules provides no warrant for broadly decreeing a particular level of First Amendment protection for cable television, or any other variety of communications technology. The Solicitor General claims that the must-carry rules are a remedy for problems of concentration and anticompetitive abuse in the cable industry. The Court should not endorse different laws that cannot be justified by that rationale, or issue a ruling that would give the Government greater power to exclude new entrants from video programming.

II. The nature of the governmental restriction on speech is the critical determinant of the level of scrutiny to which a restriction should be subjected, regardless of the technology used to transmit the information at issue. Thus, this Court applied strict scrutiny in *Sable Communications, Inc. v. FCC*, 492 U.S. 115 (1989), notwithstanding the fact that the case involved wireline communications, and this Court took note of the direct, content-based nature of the restrictions on speech at issue in *FCC v. League of Women Voters*, 468 U.S. 364 (1984), even though that case involved broadcasting.

There is a fundamental difference among (1) direct prohibitions on speech like 47 U.S.C. § 533(b), (2) preferential speaker- or content-specific access rules, and (3) neutral, nondiscriminatory access rules. *Amici* believe that the must-carry rules contained in §§ 534 and 535, which fall into the second rather than the third category, are unconstitutional. In any event, however, it is critical to recognize that access rules, whatever their constitutionality, lend no support to direct bans on speech — and particularly to laws that use the content of expression to identify what information a speaker is forbidden to provide to that speaker's chosen audience. Access rules affect speech merely incidentally, by burdening expression

only insofar as distribution capacity cannot be expanded to accommodate additional speakers.

The difference between access requirements like the must-carry rules and direct prohibitions on speech is particularly salient with respect to *amici*. Telephone companies are currently subject to nondiscriminatory access obligations as common carriers that are far more extensive than the must-carry rules at issue here, and that also avoid the constitutional infirmity identified by Judge Williams. Telephone companies that delivered their own video programming over their common-carrier networks would retain these nondiscrimination obligations. Hence, the permissibility of an access rule could not be used to justify a restriction like § 533(b).

In short, if the Court does sustain the decision below, we respectfully urge the Court to avoid a broad ruling that sweeps beyond the key factors of this case and the special nature of the must-carry rules, in view of the related, but nonetheless very different, questions that may soon be presented to the Court in litigation regarding § 533(b).

ARGUMENT

Amici believe that the must-carry rules of the 1992 Cable Act are invalid under the First Amendment, and we urge this Court to reverse the judgment of the district court. As Judge Williams noted, those rules do not extend access on the basis of "neutral criteria for service." 819 F. Supp. at 57 (dissenting opinion). Rather, they "extend the privilege of access only to a special class of unaffiliated programmers" — local broadcast television stations — because of a legislative judgment that the programming content provided by those speakers is especially worthy. *Id.* at 58.

While Judge Williams applied strict scrutiny, *see id.* at 60, *amici* believe that the must-carry rules are also invalid under the test of *United States v. O'Brien*, 391 U.S. 367, 377 (1968), and *Ward v. Rock Against Racism, Inc.*, 491 U.S. 781, 798 (1989). Congress' factfinding with respect to §§ 534 and 535 is noteworthy, both because it was unusually extensive and because it was embodied in formal legislative findings adopted as part of the 1992 Cable Act. This type of factfinding is completely absent in the case of many laws, such as 47 U.S.C. § 533(b).

Nevertheless, Congress' factfinding is woefully inadequate for the reasons elucidated by Judge Williams, *see* 819 F. Supp. at 61-64 (dissenting opinion), and *amici* submit that the factual predicate for the must-carry rules cannot sustain them under *any* form of heightened First Amendment scrutiny, including the test of *O'Brien* and *Ward*. For example, "the fit between the interest and the regulation is extremely weak," because there are less intrusive alternatives endorsed by Congress demonstrating that §§ 534 and 535 are not narrowly tailored to the asserted governmental interests. 819 F. Supp. at 61.

Amici submit this brief not only to support appellants, but also to make this Court aware that the analytical approach taken in the present case could well have an impact on many other cases involving cable and other new technologies for the transmission of ideas, information, and opinion. For example, the constitutionality of the statute prohibiting telephone companies from providing video programming directly to subscribers within their telephone service areas, 47 U.S.C. § 533(b), is a question that may soon be before this Court.[3] *Amici* believe that the decision below should be reversed; but whether or not this Court accepts that argument, the Court should not prejudge any of the related, but nonetheless very different, questions regarding the flat ban on speech contained in § 533(b).

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[3] As is noted above, one federal district court has struck down the law as a "draconian" measure burdening substantially more speech than is necessary to serve the Government's asserted interests. *Chesapeake & Potomac Telephone Co. of Virginia v. United States*, No. 92-1751-A, Mem. Op. at 46 (E.D. Va. Aug. 24, 1993), *appeal pending*, Nos. 93-2340 (4th Cir.) (filed Oct. 15, 1993). Other First Amendment challenges have also been brought.

I. THE COURT SHOULD NOT CREATE A FIRST AMENDMENT HIERARCHY AMONG THE VARIOUS MEMBERS OF THE PRESS

This case presents no occasion to articulate a First Amendment hierarchy in which certain members of the press would be deemed "more equal" than others and in which varying levels of judicial protection for particular transmittal technologies would be frozen into the Constitution. Although in the past this Court has explained that "[e]ach medium of expression . . . must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems," *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975), the Court has also emphasized that "the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary. Those principles . . . make freedom of expression the rule." *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952).

The proper approach is not to formulate individual standards of scrutiny for various communications technologies, which are not only rapidly evolving but also converging. Rather, the proper approach is to recognize that differences between these technologies and the more traditional media of mass communications can be considered on a case-by-case basis in identifying the government's interest in a particular regulation at issue. Specifically, we urge the Court not to constitutionalize a permanent First Amendment bias that would give less freedom to speech that is delivered over electronic information highways rather than over asphalt and concrete rights of way. If a particular technology presents a special public policy problem, that problem can be taken into account in determining whether the government has adequately demonstrated an overriding interest in the individual regulation at issue.

This approach is strongly supported by several factors with which *amici* are especially familiar.

A. The Ongoing Communications Revolution Counsels Against Any Attempt To Construct A First Amendment Hierarchy

Traditional distinctions among different media are breaking down, and technological change would overwhelm any attempt to establish any sort of First Amendment hierarchy among various print and electronic communications media.[4] The Government has already conceded in this case that wireline communications such as telephone and cable services eliminate the physical scarcity of the electromagnetic spectrum and the problem of interference on which *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), is based.[5] In the same way, contemporary technological changes are transforming and merging previously distinct methods of transmitting information.

Thus, newspapers and magazines are losing their former identity as exclusively print media and have increasingly turned to electronic means of distributing their wares directly to the homes and offices of their subscribers. Once the information is transmitted, the recipient can store or manipulate it in electronic form, or print it in hard copy to read in the familiar paper format.[6]

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[4] *Cf. Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 458 (1983) (O'Connor, J., dissenting) (noting the problem of technological change overtaking constitutional categories).

[5] The Government has not disputed that "cable television is technologically distinct from broadcast television" and that "there exist no absolute physical limitations to the construction of cable systems equivalent to the physical scarcity of the broadcast spectrum." Defendants' Response to Time Warner Entertainment Co.'s Statement of Material Facts Allegedly Not in Dispute, in *National Cable Television Ass'n v. FCC*, Nos. 92-2495, et al., at ¶ 23 (D.D.C. filed Feb. 25, 1993) (emphasis omitted).

[6] Many publications are already available in electronic versions, from such services as America Online, CompuServ, Prodigy, LEXIS/NEXIS, DataTimes, and Dialog. Time magazine, the San Jose Mercury News, the Chicago Tribune, and other newspapers and periodicals have their own electronic services, and many publishers, including Dow Jones, Times Mirror Co., Cox Enterprises, Gannett, Knight-Ridder, the Washington Post, and U.S. News and World Report, have announced plans for more in the future.

The electronic medium allows publishers to enhance the depth and timeliness of their coverage.[7] In short, the notion of a First Amendment hierarchy with the print media at its apex is already obsolete.

More generally, advances in the electronic delivery of information mean that many kinds of previously disparate communications services are converging in a single, sprawling market. By itself, each new development may seem a technical curiosity — interactive cable and television shows that permit the audience to respond to news and entertainment; video on demand, which permits viewers to select movies and other programming at their discretion and in effect to become their own programmers; instant on-line access to health care information, educational materials, computer software and video games. But each development is a signal that telephones, televisions and computers are merging into a single technology and that the ongoing electronic and digital revolution is already transforming the press. One noted commentator has explained that, in the computer age,

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See Click! On-Line Newspaper Is a Mixed Read, Wash. Post, Oct. 23, 1993, at A-1.

Beginning in 1994, the Wall Street Journal will offer an electronic newspaper called "Personal Journal," which will replicate the Journal's traditional format, using similar typefaces and retaining features such as the front-page "What's News" index. *Washington Business*, Wash. Post, Oct. 11, 1993, at 17.

A leading cable company has announced plans to enable its customers to receive and to print magazine articles, coupons, or ads via cable TV service. *Digest*, Wash. Post, Oct. 12, 1993, at D-1.

And a division of Motorola broadcasts pages of news, sports, and weather reports from USA Today to customers who use its beeper-size receivers. *Ameritech to Offer "Solutions" for Wireless Data Providers*, Wireless Messaging Report, Oct. 26, 1993, at 5.

[7] For example, stock prices in a newsprint paper are out-of-date by the time the edition hits the streets, while stock prices in the paper's electronic version can be constantly updated. Moreover, electronic newspapers can incorporate interactive components that permit subscribers greater control over what they read. In the electronic version of some newspapers, for instance, readers can ask for additional information that is not available in the newsprint edition.

"bits are bits. . . . There really is not as much of a fundamental difference as we want to think between radio, television, newspaper, magazines."[8]

Developments in fiber optics and signal compression technologies mean that information and advanced services can now be delivered over broadband networks with immense carriage capacity. New wires can be deployed without interfering with existing networks. *Red Lion*, with its focus on problems of physical interference and scarcity, is strikingly inapposite in this context. Indeed, these broadband networks will be equally available to all speakers, so that there will be no need for the kind of governmental allocation that occurs in the context of the electromagnetic spectrum.

In light of the ongoing technological and market upheavals, it would be extraordinarily unwise to use the instant case to constitutionalize extant but potentially ephemeral technological distinctions among various forms of public expression. The history of the legal treatment of emerging technologies provides a cautionary lesson. At the dawn of the motion picture age, this Court held that movies were not protected by the First Amendment. *Mutual Film Corp. v. Industrial Comm'n of Ohio*, 236 U.S. 230, 244 (1915). When radio was in its infancy, the Federal Radio Commission, predecessor to the FCC, warned licensees that "[t]he Commission is unable to see that the guaranty of freedom of speech has anything to do with entertainment programs as such."[9] As one astute observer has explained, "[t]echnical laymen, such as judges, perceive the new technology in that early, clumsy form, which then becomes their image of its nature, possibilities, and use. This perception is an incubus on later understanding." I. de Sola Pool, *Technologies of Freedom* 7 (1983).

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[8] *Into Media's Future, Digitally*, N.Y. Times, Oct. 17, 1993, at F-9 (quoting Nicholas Negroponte, director of MIT's Media Laboratory).

[9] FRC Second Annual Report at 160, quoted in Caldwell, *Censorship of Radio Programs*, 1 J. Radio L. 441, 467 (1931).

There is no reason to repeat this cycle with the communications technologies of the new information age.

B. In Any Event, Video Programming Should Not Be Relegated To Less-Than-Full Constitutional Status

1. Video Programming Is a Critical Form of Communication

As traditional media increasingly rely on electronic means of delivering information, the primacy of video programming has become all the more evident. Video programming is an uniquely effective and popular form of communication that has become the public's principal source of news, entertainment, and other information. Many more households have televisions than subscribe to newspapers.[10] The average television household watches television seven hours per day, whereas the average newspaper receives only 45 minutes of attention.[11] In addition, the "'power to communicate ideas through sound and visual images . . . is significantly different from traditional avenues of communication because of the immediacy of the medium.'" *Telecommunications Research & Action Center v. FCC*, 801 F.2d 501, 508 (D.C. Cir. 1986) (quoting FCC Report and Order), *cert. denied*, 482 U.S. 919 (1987). In short, video programming is the most pervasive form of communication in the United States today; it is the contemporary equivalent of the handbill, newspaper, and live entertainment source rolled into one.

Moreover, this Court has already indicated that video programmers are members of the "press" and exercise editorial

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[10] According to the Census Bureau, 92 million households (or 98 percent of all households) have a television, in contrast to a total daily newspaper circulation of 62 million. U.S. Dept. of Commerce, Bureau of the Census, *Statistical Abstract of the United States 1992*, Table 884 (112th ed. 1992).

[11] Federal Communications Comm'n, Office of Plans and Policies, *Broadcast Television In a Multichannel Marketplace*, OPP Working Paper No. 26, at 19, 107 (June 1990); Newspaper Ass'n of America, *Facts About Newspapers '92*, at 25 (1992).

discretion that is protected expression under the First Amendment. *Leathers v. Medlock*, 111 S. Ct. 1438, 1442 (1991); *Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986). Video programmers exercise such discretion in creating, choosing, arranging, and packaging programming for sale to consumers. These functions are indistinguishable from those performed by booksellers or newspaper publishers, which also frequently distribute material prepared by others and must determine in the first instance whether the material should be published at all and also how it should be arranged and editorially packaged.[12] In the information age, it is the exercise of this editorial discretion and judgment, not the technological means which the publisher uses to deliver the resulting information, that should be the primary determinant of First Amendment protection.[13]

For these reasons, it would be utterly unjustified to place video programming at the low end of an arbitrary First Amendment hierarchy, or to give the government broad license to determine who may engage in constitutionally protected programming functions. Indeed, this Court's decisions reflect special solicitude for "uniquely valuable or important mode[s] of communication." *Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 812 (1984); *see also Schneider v. State*, 308 U.S. 147, 164 (1939) (invalidating restrictions on pamphleteering, while noting that "pamphlets have proved most effective instruments in the dissemination of opinion"

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[12] Newspapers typically rely upon news services like the Associated Press for national and international news. A 1986 study found that AP member papers fill 37% of their news needs with AP copy. C. Fink, *Strategic Newspaper Management* 167 (1988). Newspapers also rely on feature syndicates for materials such as cartoons, editorial cartoons, sports scores, weather maps, and columnists. Many Sunday newspapers include preprinted inserts such as comics sections, magazines like *Parade*, and television listings.

[13] When acting as video programmers, telephone companies exercise the same editorial discretion as other electronic publishers. This activity, however, does not detract from their concurrent obligations to provide electronic distribution services to unaffiliated video programmers when operating as common carriers. *See* pp. 23-24, *infra*.

and that "perhaps the most effective way of bringing them to the notice of individuals is their distribution at the homes of the people"). Video programming is a major means of expression for which there is no adequate substitute, and any law prohibiting a class of speakers from engaging in it should be subject to heightened First Amendment scrutiny.

2. The Government's Arguments about Concentration in Cable Markets Do Not Justify Placing Video Programming at the Low End of a First Amendment Scale

The Government's justification for the must-carry rules provides no reason to decree a particular level of First Amendment protection for cable television, or for any other emerging communications technology. The Solicitor General contends that the must-carry rules are a permissible means "of addressing the market power and concentration of cable system operators and the anti-competitive practices existing in the cable television industry." Motion of the Federal Respondents to Affirm, in No. 93-44 at 4-5. Accordingly, the Solicitor General contends, cable television should be subject to a regulatory approach "comparable" to that of broadcasting. *Id.* at 19.

There are powerful legal reasons to reject the Solicitor General's argument. This Court has made clear that the "scarcity" doctrine underlying the broadcast regulatory regime established in *Red Lion* is linked specifically to the problems of interference caused by the physical scarcity of the *electromagnetic spectrum*[14] — a problem

[14] *See, e.g., Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 375 n.4, 376, 388-90, 397-400 (1969). In *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 799 (1978), the Court reaffirmed that this rationale was premised on "the physical limitations of the broadcast spectrum" and "problems of interference between broadcast signals." In *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), the Court once again noted that the broadcasting doctrine is premised on "the scarcity of [electromagnetic] frequencies." *Id.* at 566 (internal quotation omitted; brackets in original); *see also CBS, Inc. v. Democratic Nat'l Committee*, 412 U.S. 94, 101 (1973). The Court has predicted that technological advances altering spectrum scarcity may lead to a revision of the appropriate

that indisputably does not arise in the case of cable television. This Court has consistently held that the broadcasting doctrine cannot be transferred by metaphor to other kinds of scarcity.[15] The *Red Lion* Court itself explained that its decision was premised solely on the unique physical limitations of the spectrum and that it was not addressing scarcity caused by economic conditions.[16]

In *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), this Court rejected an attempt to transform *Red Lion* into a broader "scarcity" theory. The Court acknowledged that "the same economic factors which have caused the disappearance of vast numbers of metropolitan newspapers, have made entry into the marketplace of ideas served by the print media almost impossible." 418 U.S. at 251. The Court noted that "[t]he First Amendment interest of the public in being informed is said to be in peril because the 'marketplace of ideas' is today a monopoly controlled by the owners of the market," *id.*, and warned that "a local newspaper . . . has extraordinary power to set the atmosphere and determine the terms of local consideration of public issues." *Id.* at 250 n.15. Nonetheless, the Court concluded that "press

constitutional approach to broadcast regulation. *See FCC v. League of Women Voters*, 468 U.S. 364, 376-77 n.11 (1984); *see also Metro Broadcasting*, 497 U.S. at 590 n.41.

[15] This Court has refused to accept *Red Lion* as justification for regulations affecting arguably scarce resources in the context of elections, *see Buckley v. Valeo*, 424 U.S. 1, 49 n.55 (1976) (*per curiam*), corporate expression, *see First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 791 n.30 (1978), and speech by regulated monopolies, *see Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 543 (1980). The limits of *Red Lion* are apparent in the Court's observation that "[o]ur decisions have recognized that the special interest of the Federal Government in regulation of the broadcast media does not readily translate into a justification for regulation of other means of communication." *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 74 (1983).

[16] "We need not deal with the argument that even if there is no longer a technological scarcity of frequencies limiting the number of broadcasters, there nevertheless is an economic scarcity in the sense that the Commission could or does limit entry to the broadcasting market on economic grounds and license no more stations than the market will support." 395 U.S. at 401 n.28.

responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated." *Id.* at 256. The newspaper industry remains highly concentrated today.[17]

More fundamentally, however, the Solicitor General's argument plainly cannot justify reduced constitutional protection for cable television as a categorical matter, or a lower level of scrutiny for every law touching on cable television. Many such laws simply cannot be justified by the governmental interest in preventing cable monopolies. For example, every expert government agency to have studied the issue has concluded that the statutory ban on video programming by telephone companies in their telephone service areas, 47 U.S.C. § 533(b) exacerbates concentration in cable markets.[18] It would be perverse to use the concentrated nature of

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[17] While daily newspapers are published in some 1,513 cities, there are competing dailies in only 37 cities and 19 of these are published under joint operating agreements. NAA, *Facts About Newspapers '92*, at 26 (1992); *see also CBS, Inc. v. Democratic National Committee*, 412 U.S. 94, 144 (1973) (Stewart, J., concurring) ("there are many more broadcasting stations than there are daily newspapers," and "newspapers get Government mail subsidies and a limited antitrust immunity").

[18] *See Video Dialtone Order*, 7 FCC Rcd 5781 (1992) (formal recommendation by FCC to Congess that § 533(b) be repealed); Report of the Federal Communications Commission Regarding the President's Regulatory Reform Program 16, 67 (April 28, 1992) (explaining that removing the ban would "increas[e] competition in the video marketplace, spur[] the investment necessary to deploy an advanced infrastructure, and increas[e] the diversity of services made available to the public," and that introducing competition from telephone companies "would result in significant price savings for consumers and stimulate provision of a range of new information services," with rates falling about 20 percent and subscribership increasing by 11.2 million households nationwide); Reply Comments of the United States Department of Justice, *Telephone Company-Cable Television Cross-Ownership Rules*, CC Dkt 87-266 at 44-46 (Mar. 13, 1992) (explaining that telephone companies "should be allowed to own and directly provide video programming" because telephone company "provision of video programming will have procompetitive benefits that outweigh any anticompetitive risks involved," and because telephone company entry would introduce a needed competitor to the video programming market); Reply Comments of National Telecommunications and Information Administration, *Teleport*, File No. 13135-CF-TC(3)-92 (May 27, 1992) (removal of § 533(b) would

cable markets as a rationale for applying reduced scrutiny to a law that is at least partially responsible for that very problem.

In this regard, the Solicitor General's claim that cable television is a "natural monopoly," Motion to Affirm at 13 — a claim implying that greater competition in cable markets would be infeasible and economically ruinous — seriously misstates Congress' factfinding. In the 1992 Cable Act, Congress found that cable television is an *unnatural* monopoly and that greater competition should be encouraged.[19] Indeed, the Act was specifically directed at exclusionary practices barring second entrants from cable markets. Section 7(a)(1) of the Act amended 47 U.S.C. § 541(a)(1) by providing that "a franchising authority may not grant an exclusive franchise and may not unreasonably refuse to award an additional competitive franchise." 106 Stat. 1483.[20] Moreover, the Act facilitated entry into cable markets by municipalities, even in areas where there is already an incumbent cable provider. *See* § 7(c), 106 Stat. 1483, codified at 47 U.S.C. § 541(f). These provisions are testimony to Congress' conclusion that cable markets, although currently concentrated, are not natural monopolies, and that competition should be encouraged as much as possible.[21]

"significantly increase competition in the video services market, which would, in turn, yield lower prices to viewers, better service quality, and better programming diversity").

[19] *See, e.g.*, H.R. Rep. No. 628, 102d Cong., 2d Sess. 46 (1992) ("consumers would benefit greatly from the existence of two competing cable systems operating in a given market").

[20] Prior to the passage of the 1992 Cable Act, commentators and courts had maintained that "the tendency toward monopoly . . . may well be attributable more to governmental action — particularly the municipal franchising process — than to any 'natural' economic phenomenon." *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1450 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986); *see also* Hazlett, *The Policy of Exclusive Franchising in Cable Television*, 31 J. Broadcasting & Electronic Media 1, 18 (1987).

[21] Competing cable systems operate side-by-side in at least 53 communities, *see, e.g.*, 819 F. Supp. at 40 n.16, and some of these competitive systems have been in place for 20 years or more. The government's theory of "natural monopoly" is also belied by its own actions.

The rate regulation provisions of the 1992 Cable Act underscore this conclusion. Congress' stated policy was "to rely on the marketplace, to the maximum extent feasible," to "promote the availability to the public of a diversity of views and information through cable television and other video distribution media." § 2(b)(1), (2), 106 Stat. 1463. Accordingly, the Act embodies a "preference for competition" (§ 3(a), 106 Stat. 1464, codified at 47 U.S.C. § 543(a)) and authorizes rate regulation only "[i]f the [FCC] finds that a cable system is not subject to effective competition." *Id.* The Act plainly evidences Congress' finding that competition in cable markets is economically feasible and, indeed, in the interest of American consumers.

For all these reasons, this Court need not and should not use this case to squeeze cable or any other technology for the distribution of ideas into a First Amendment pigeonhole.

II. THE NATURE OF THE GOVERNMENTAL RESTRICTION ON SPEECH IS THE CRITICAL FACTOR IN DETERMINING THE APPROPRIATE LEVEL OF SCRUTINY

Rather than focusing exclusively or even primarily on the fact that the speech here is the expression of cable companies, the Court should follow the usual approach in First Amendment cases: paying close heed to the nature of the governmental restriction in determining the appropriate level of scrutiny. Under such an approach, the Court would refrain from prejudging questions that might arise not in the context of the must-carry rules, but in such very different situations as that of § 533(b).

The most critical factor in determining the proper level of First Amendment scrutiny has always been the nature of the restriction on speech. Thus, this Court applied strict scrutiny to the cross-

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The government has not only expressed its strong belief that competition can exist, but it has also encouraged telephone companies and others to deploy competing video delivery systems in areas that are already served by cable, *see, e.g.*, *Video Dialtone Order*, 7 FCC Rcd 5781 (1992), a step that would be futile if it believed that cable was a natural monopoly.

burning ordinance in *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992), notwithstanding the fact that the racial hate speech at issue there was completely unprotected, in the sense that its content was constitutionally proscribable. The Court's analysis hinged on the fact that the law was content-based — it singled out "fighting words" for a special penalty if they concerned "race, color, creed, religion, or gender." *See also Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837 (1987) (State can ban shouting "fire" in a crowded theater, because such speech is unprotected, but cannot adopt a law that contains "dispensations to those willing to contribute $100 to the state treasury").

In the same way, the nature of the restriction — not merely the character of the medium used to transmit the information — plays the primary role in determining the appropriate level of constitutional scrutiny. In *Sable Communications, Inc. v. FCC*, 492 U.S. 115 (1989), for instance, this Court invalidated a congressionally imposed, prophylactic ban on indecent interstate telephone messages on the ground that it "far exceed[ed] that which is necessary to" achieve the government's interest. *Id.* at 131. The Court did not develop a special doctrine governing information conveyed over telephone lines; it simply took account of the physical characteristics of telephones in assessing the fit between the government's asserted interest and the law at issue.

Indeed, this Court has noted, even in the sphere controlled by *Red Lion*, that "[t]he [Federal Communications] Commission has eschewed direct federal control over discrete programming decisions," *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 585 n. 36 (1990), and has warned that the contrary approach would "raise[] 'serious First Amendment issues.'" *Id.* (citation omitted).[22] In *FCC v. League of Women Voters*, 468 U.S. 364

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[22] *See also FCC v. WNCN Listeners Guild*, 450 U.S. 582, 596 n.32, 597 (1981) (noting the policy, even in the broadcast context, of preserving the licensee's editorial control over programming); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 495 (1975) (protecting "freedom of the press" in broadcast context); *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 127 (1973) (rejecting right of access in part because it "would tend to draw [the FCC] into a continuing case-by-case determination of who should be heard and when").

(1984), for example, the Court struck down under the First Amendment a congressionally imposed ban on editorializing by public television and radio stations. The Court explained that the scope of the prohibition was "defined solely on the basis of the content of the suppressed speech." *Id.* at 383. Furthermore, the Court observed that, "in sharp contrast to the restrictions upheld in *Red Lion* or in *CBS, Inc. v. FCC*, which left room for editorial discretion and simply required broadcast editors to grant others *access* to the microphone, [the ban on editorializing] *directly prohibits* the broadcaster from speaking out on public issues even in a balanced and fair manner." *Id.* at 385 (emphasis added). In short, even in the broadcast context, this Court has invalidated direct bans on speech that are not narrowly tailored to any legitimate and substantial governmental interest.[23]

Hence, the nature of the restriction on speech must be the Court's chief focus. *Amici* believe that the must-carry rules have the unconstitutional effect of replacing programming that cable operators would otherwise choose to carry with that of certain governmentally-preferred speakers. But it is important to note that access requirements like the must-carry rules, whatever their constitutionality, stand on a vastly different footing from laws that directly ban speech. In short, it is critical to distinguish among (1) flat bans on speech like § 533(b), (2) access rules that embody speaker- or content-specific preferences, and (3) nondiscriminatory access rules. Even if the Government were correct that §§ 534 and

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[23] *See, e.g.*, 468 U.S. at 392 ("the manifest imprecision of the ban imposed by [the statute] reveals that its proscription is not sufficiently tailored to the harms it seeks to prevent to justify its substantial interference with broadcasters' speech"); *id.* at 395 (the government's "interest can be fully satisfied by less restrictive means that are readily available" and thus the ban on editorializing "far exceeds which is necessary" to achieve the interest and "impermissibly sweeps within its prohibition a wide range of speech" that does not cause the asserted evil); *id.* at 396 ("The patent overinclusiveness and underinclusiveness of [the] ban 'undermines the likelihood of a genuine [governmental] interest'") (citation omitted; brackets in original); *id.* at 398 ("Since the breadth of [the ban on editorializing] extends so far beyond that which is necessary to accomplish the goals identified by the Government, it fails to satisfy the First Amendment standards that we have applied in this area").

535 belong in category (3) rather than (2), such a conclusion could offer no support to direct bans such as § 533(b).

There is a qualitative difference between access rules — which directly silence no speech and burden expression only insofar as distribution capacity cannot be expanded to accommodate additional speakers — and direct prohibitions on speech. Access rules usually include new voices without excluding old ones, and accordingly can be less intrusive ways to further legitimate government interests without cutting off the free flow of ideas. Thus, the Court upheld a nondiscriminatory access rule in *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 81, 87 (1980) (State may require shopping center to permit peaceful speech and petition activities), on the assumption that it did not seriously impede the owner's ability to get his own message across. *See Pacific Gas & Electric Co. v. Public Utilities Comm'n of California*, 475 U.S. 1, 12 (1986) (plurality opinion) ("Notably absent from *PruneYard* was any concern that [the state law] might affect the shopping center owner's exercise of his own right to speak"); *id.* at 24 (Marshall, J., concurring in judgment) ("While the shopping center owner in *PruneYard* wished to be free of unwanted expression, he nowhere alleged that his own expression was hindered in the slightest").[24]

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[24] A subsequent decision by Judge Jackson, who authored the opinion below upholding the must-carry rules contained in §§ 4 and 5 of the 1992 Cable Act, makes plain the distinction between access rules and prohibitions on speech. In a separate proceeding, Judge Jackson invalidated a portion of § 11(c) of the Act directing the FCC to prescribe rules "establishing reasonable limits on the number of cable subscribers" a cable operator is authorized to reach through cable systems it owns or in which it has an attributable interest. Judge Jackson held that "[a]ny governmentally ordained quota on the number of subscribers a cable operator may reach leaves the operator with absolutely no intra-medium means of speaking to the remainder of its potential audience." *Daniels Cablevision, Inc. v. United States*, No. 92-2292, mem. op. at 21 (D.D.C. Sept. 16, 1993). Section 11(c) of the 1992 Act also directs the FCC to "consider the necessity and appropriateness" of limiting the extent to which cable operators may create cable programming. Addressing this provision in dictum, Judge Jackson observed that "a regulation *directly* limiting the ability of operators to 'speak' as programmers would surely be constitutionally troubling." Mem. op. at 21 n.17 (emphasis added). In addition, Judge Jackson struck down, as impermissibly "content-

For this reason, the Solicitor General's heavy reliance on *Associated Press v. United States*, 326 U.S. 1 (1945), *see* Motion of Federal Respondents to Affirm, in No. 93-44, at 10, 11, 22, 26, illustrates the limitations of the Government's position.[25] In *AP*, members of a newspaper cartel were refusing to sell their newswire service to competing non-members. In holding such conduct illegal, this Court invoked a generally applicable law (the Sherman Act), rather than an "industry-specific" rule like the must-carry requirement, 819 F. Supp. at 40, that singles out a portion of the press for special regulation.[26] Moreover, the remedy approved by this Court in *AP* neither silenced speech nor included speaker- or content-specific preferences. Quite the contrary: the remedy attacked the antitrust abuse neutrally and directly, by providing that

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related," provisions regulating indecent programming and requiring a set-aside for educational programming on direct broadcast satellites. Mem. op. at 15-16, 18.

[25] *Associated Press* — which is, after all, a case about *newspapers* rather than cable or broadcast television — also illustrates the need to focus on the nature of the restriction on speech, rather than on the characteristics of the medium through which the information is conveyed.

[26] In reviewing "decisions holding that generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news," *Cohen v. Cowles Media Co.*, 111 S. Ct. 2513, 2518 (1991), this Court provided an illustrative list of what is meant by "generally applicable laws": the National Labor Relations Act, *Associated Press v. NLRB*, 301 U.S. 103 (1937); the Fair Labor Standards Act, *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186 (1946); laws providing for grand jury subpoenas, *Branzburg v. Hayes*, 408 U.S. 665 (1972)); copyright laws, *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977); the antitrust laws, *Associated Press v. United States*, 326 U.S. 1 (1945); and non-discriminatory tax laws, *Murdock v. Pennsylvania*, 319 U.S. 105 (1943). Unlike §§ 553(b), 534 and 535, all those laws apply to a broad category of businesses as businesses, and none singles out speech as such for the specific purpose of regulating it. Indeed, this Court has repeatedly rebuffed efforts to characterize a law singling out expression as nothing more than a "general" economic regulation. *See Minneapolis Star & Tribune Co. v. Minneapolis Comm'r of Revenue*, 460 U.S. 575, 581 (1983); *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 112 S. Ct. 501, 509 (1991); *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 789 n.5 (1988).

"AP news is to be furnished to competitors of old members without discrimination." 326 U.S. at 21. This Court carefully noted that this remedy did not affect either AP's or its members' rights to report or publish what they wished. The remedy did not "interfere[] with freedom 'to print as and how one's reason or one's interest dictates.'" *Id.* at 20 n.18. Direct bans on speech, of course, do not leave a speaker free to express herself as she pleases.[27]

The difference between access rules and direct bans on speech is especially significant in analyzing the difference between the must-carry rules and § 533(b) because telephone companies are currently subject to neutral common-carrier obligations far more extensive than a must-carry rule. As the Bell Companies have acknowledged with respect to their telephone networks, their "voluntary dedication of [these] networks to public use precludes any claim on their part that they have a First Amendment right to exclude competing information providers from their networks. The Supreme Court has made clear that, when privately owned facilities are dedicated to the public, the First Amendment does not invalidate laws requiring those facilities to be held open on a nondiscriminatory basis to all speakers."[28] Thus, Judge Williams

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[27] Other antitrust precedent confirms the crucial distinction between access rules and direct bans. In *Lorain Journal Co. v. United States*, 342 U.S. 143, 155-56 (1951), for example, a newspaper sought to drive a radio station out of business by refusing to run ads for those parties that chose to advertise on the station; the Court found it proper to enjoin this antitrust violation by requiring access. In *Citizens Publishing Co. v. United States*, 394 U.S. 131 (1969), this Court held that a decree ordering one newspaper corporation to divest the stock of another, and to refrain from certain joint operating practices such as a "profit pooling arrangement," did not violate the First Amendment. The Court commented that "[n]either news gathering nor news dissemination is being regulated by the present decree. It deals only with restraints on certain business or commercial practices" that bear no significance under the First Amendment. 394 U.S. at 139.

[28] Brief of the Bell Company Appellants, in *United States v. Western Electric Co.*, No. 87-5388, at 25 n.84 (D.C. Cir.) (filed Apr. 17, 1989) (citing *PruneYard*); *see also* Amicus Brief of Bell Atlantic in *National Cable Television Ass'n v. United States*, No. 92-2495 (D.D.C.) (filed Mar. 9, 1993).

contrasted the constitutionally invalid must-carry rules with neutral leased access provisions and with requirements that a carrier "serve all parties that meet neutral criteria for service." 819 F. Supp. at 57-58 (dissenting opinion) (using the example of rules that guarantee telephone long-distance carriers access to local exchange service).

Recognizing telephone companies' right to provide video programming is in no way inconsistent with their common carrier obligations, since an entity "can be a common carrier with regard to some activities but not others." *National Ass'n of Regulatory Utility Comm'rs v. FCC*, 533 F.2d 601, 608 (D.C. Cir. 1976) (opinion of Wilkey, J.); *see FCC v. Midwest Video Corp.*, 440 U.S. 689, 701 n.9 (1979). Telephone companies already originate electronic information over their own networks in the form of voice and data messages, including time and weather reports, traffic updates, and news and financial reports. Their obligation also to transmit the voice and data messages of third parties on a common-carrier basis, however, is unaltered. In the same way, telephone companies that delivered their own video programming over their common-carrier networks would remain subject to a nondiscriminatory access obligation.

In sum, *amici* ask the Court to remain cognizant of the special nature of the must-carry rules before it. *Amici* believe that those rules offend the First Amendment. Even if this Court nevertheless upholds them, it should make clear that they provide no support at all to laws that directly ban speech, especially where the silenced speaker is already subject to a comprehensive access obligation.

CONCLUSION

The decision below should be reversed. In any event, this Court should not prejudge any of the issues that may soon be presented to it in *Chesapeake & Potomac Telephone Co. of Virginia v. United States* and other litigation regarding § 533(b).

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